IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

IN RE: B.J.	:	APPEAL NO. C-081261 TRIAL NO. F99-2491X
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	:	*D E C I S I O N.*
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Civil Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: December 11, 2009

Jeffrey A. Burd, *Stephen R. King*, and *King & Koligian, LLC*, for Appellants Rick and Cynthia Hutchinson,

Ross M. Evans and *Katz, Greenberger, and Norton, LLP*, for Appellees Damon and Jamie James.

Note: We have removed this case from the accelerated calendar.

Per Curiam.

{¶1} This case involving the change of custody of a child to his parents from his grandparents is on appeal in this court for the second time. We reverse the juvenile court's judgment awarding custody to the parents because it is contrary to law. But we remand the cause for the juvenile court's consideration of the parents' supplemental motion to modify the prior custody order.

{¶2} The parents, appellees Damon and Jamie James, have sought to regain custody of their son, B.J., born in 1999. Almost ten years ago, B.J. was adjudicated abused and dependent due to the conduct of his parents. Prior to the adjudication, by agreement of the parties, the Hamilton County Department of Human Services had been awarded temporary custody, and B.J. had been placed with his maternal grandparents, appellants Rick and Cynthia Hutchinson. After the adjudication, the juvenile court committed him to the temporary custody of the department with continued placement with his grandparents. The department further developed a case plan for the parents. In May 2001, at the annual review of the case plan, the department asked the juvenile court to award legal custody of B.J. to his grandparents. The parents stipulated to that request, and the court found that awarding legal custody to the grandparents would be in the best interest of B.J. The court also allowed the parents supervised visitation with B.J.

{¶3} In February 2004, the parents moved to obtain custody of B.J.. Several months later, the juvenile court modified the prior custody order by awarding custody of B.J. to his parents. The court's decision rested on a finding that the Jameses were suitable parents and that it was in B.J.'s best interest to be with his parents; but the court did not determine that the best-interest inquiry was warranted by any change that had occurred in the circumstances of B.J. or his grandparents.

{¶4} The grandparents appealed that decision. They argued in part that the juvenile court could not have considered the parents' motion for a change in custody without first determining that a change in circumstances had occurred. They cited R.C. 3109.04(E), which provides that "[t]he court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interests of the child."

{¶5} This court affirmed the judgment of the juvenile court transferring custody of B.J. from his grandparents to his parents.[1] In doing so, we held that "when a nonparent has nonpermanent custody of a child, the requirement in R.C. 3109.04(E)(1)(a) that the child's parent must demonstrate a change in circumstances for either the child or the nonparent in order for the court to modify custody is unconstitutional."[2] We concluded that the statute was unconstitutional because it deprived the Jameses of their fundamental right to parent their child, B.J.[3]

{¶6} The Ohio Supreme Court accepted a discretionary appeal "to review the constitutionality of R.C. 3109.04(E)(1)(a) as applied in [the Jameses'] case and, specifically, to consider whether a trial court, when modifying a prior decree allocating parental rights and responsibilities for the care of children, should consider only" the best interests of the child or must additionally determine a "change in circumstances" as set forth in the statute.[4]

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[1] *In re James*, 163 Ohio App.3d 442, 2005-Ohio-4847, 839 N.E.2d 39.
[2] Id. at ¶19.
[3] Id.
[4] *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, at ¶9.

{¶7} The supreme court determined that the grant of legal custody to the grandparents was, by statute, "intended to be permanent in nature,"[5] a characterization contrary to this court's conclusion. And the court concluded that the provisions of R.C. 3109.04(E)(1)(a) "promote stability in the development of children and are not unconstitutional as applied when a noncustodial parent has not evidenced that a change has occurred in circumstances."[6]

{¶8} Importantly, the supreme court expressly determined that the record did not establish a change in B.J.'s circumstances.[7] The court anticipated that in the future, "by evidencing a sufficient change in the child's circumstances to the court," the parents might be able to regain B.J.'s custody.[8]

{¶9} The supreme court acknowledged that applying R.C. 3109.04(E)(1)—a statute that involves the allocation of parental rights—was awkward, but that it was appropriate because "the constitutional challenge before us arose from that statute and from the appellate court's analysis and conclusion,[9] and because of a legislative mandate that the juvenile court exercise its jurisdiction in child-custody matters in accordance with R.C. 3109.04.[10] The court noted in the decision that R.C. 2151.42(B) also addresses juvenile-custody cases.[11]

{¶10} Ultimately, the supreme court reversed our judgment. The court, however, did not enter judgment for the grandparents; rather, the court "remanded the matter for further consideration in accordance with [its] opinion."

{¶11} After the remand, the case was assigned to a new judge. B.J. remained living with his parents and continued to have court-ordered companionship time with his

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[5] Id. at ¶22.
[6] Id. at ¶20.
[7] Id. at ¶18.
[8] Id.
[9] Id. at ¶24.
[10] Id. at ¶25, citing R.C. 2151.23(F)(1).
[11] Id. at ¶26.

grandparents, although the juvenile court reduced the amount of this time based on the testimony and report of a guardian ad litem ("GAL"). The parties agreed that the court could use the GAL's testimony and report for the sole purpose of modifying the companionship time. The Jameses urged the court to determine—based on the prior record—that they had demonstrated a change in B.J.'s circumstances as required by R.C. 3109.04(E)(1)(a). The Jameses took the position that "no additional testimony was required because there was already a substantial record established before the appeal" of the change in the circumstances of B.J.

{¶12} As a precaution, the Jameses filed a supplemental motion to modify the prior custody order, and they asked the court to receive new evidence if the court could not award custody of B.J. to them based upon the prior record.

{¶13} The juvenile court informed the parties that it would make a determination based on the prior record and that it would not accept new evidence. The court then found that the prior record had demonstrated a change in the circumstances of B.J., the Jameses, and the Hutchinsons. The court ultimately modified the custody order to award custody of B.J. to the Jameses.

{¶14} In this appeal, the Hutchinsons argue that the juvenile court's decision after the remand was contrary to law even though the court found a change in circumstances because (1) the finding with regard to the parents was irrelevant; (2) the finding with regard to them, as custodians, was not supported by sufficient evidence; and (3) the finding with regard to B.J. was contrary to the law-of-the-case doctrine

{¶15} We note that much of the prior record in this case that the juvenile court reviewed in 2008 to make the "change in circumstances" determination is missing—"the pleadings" and "all prior transcripts." But our resolution of the claimed error rests on issues of law, and the defect in the record does not impede our review of these issues.

{¶16} We first address the relevant parties for the change-in-circumstances determination. A juvenile court can modify a child-custody order under R.C. 3109.04(E)(1)(a) only if the court finds, based on facts that have arisen since the time of the decree or that were unknown to it at that time, first that a change has occurred in the circumstances with regard to (1) "the child," (2) "the child's residential parent," or (3) "either parent subject to a shared-parenting decree," and second that the modification is necessary to serve the best interest of the child.

{¶17} Under this statute, the Jameses, who had only residual parenting rights when they moved to modify the child-custody order in 2004, were not appropriate individuals for the change-in-circumstances inquiry that could have triggered a best-interest inquiry and a modification of the prior decree allocating parental rights and responsibilities.[12] The statute is designed "to spare children from a constant tug of war" by providing "some stability to the custodial status of the children, even though the parent out of custody may be able to prove that he or she can provide a better environment."[13]

{¶18} Further, a change in the circumstances of the parents could not have triggered a best-interest inquiry under R.C. 2151.42(B), the applicable juvenile statute for modifying the child-custody order at issue. This statute limits the change-in-circumstances determination to two individuals: (1) "the child" or (2) "the person who was granted legal custody." The Jameses did not fall into either of these categories.

{¶19} Thus, the commendable progress of the Jameses cited by the juvenile court was not pertinent to a "change in circumstances" determination. The supreme court's decision confirms this.[14]

{¶20} Next we review whether the juvenile court's determination that a change in the circumstances of the grandparents could trigger the best-interest inquiry. The

[12] See, generally, R.C. 3109.04(L) (further defining the terms used in the statute).
[13] *In re James*, 2007-Ohio-2335, at ¶15 (internal citations omitted).
[14] Id.

grandparents were the individuals granted legal custody in the order that the parents sought to modify, but they were not the parents of B.J. Although the change-in-circumstances determination for a modification under R.C. 3109.04 formerly applied to the "child" and the "custodian" of the child,[15] that broad language has been replaced with the specific terms "child," "residential parent," and "either parent subject to a shared-parenting decree." The amended law does not anticipate a nonparent custodian. Because of this change in the law and because the custody order originated in the juvenile court, we limit our analysis with regard to the grandparents to R.C. 2151.42(B).

{¶21} R.C. 2151.42(B) expressly recognized the grandparents—"the individuals granted legal custody"—as the appropriate individuals for the change-in-circumstances determination necessary for a modification of the child-custody order under that statute. With regard to a change in the circumstances of the grandparents, the juvenile court wrote, "[T]he Hutchinsons refused to do anything to help Jamie and Damon (the Jameses) in their efforts to regain custody or increase visitation time. This can be viewed as a change of circumstance."

{¶22} The grandparents argue, persuasively, that their resistance of the reunification plan could not have been viewed as a change in circumstances because, as pointed out by the Ohio Supreme Court, the transfer of legal custody that occurred when B.J. was adjudicated abused and dependent was intended to be "permanent in nature."[16] The grandparents should not have been required to aid the parents toward renunification when the goal of R.C. 2151.42(B), under the circumstances of this case, was to maintain custody with the grandparents until B.J. reached adulthood.

{¶23} Thus, we conclude that the grandparents' "refus[al] to do anything to help Jamie and Damon in their efforts to regain custody or increase visitation time" could not

[15] See former R.C. 3109.04, amended eff. Apr. 11, 1991.
[16] *In re James*, 2007-Ohio-2335, at ¶26, citing R.C. 2151.42(B).

have been used as a change in circumstance to support the juvenile court's decision awarding custody to the Jameses. We cannot affirm the juvenile court's decision on this basis.

{¶24} Finally, we address the juvenile court's change-in-circumstances determination with regard to B.J., "the child." B.J. was an appropriate individual for a change-in-circumstances determination under both statutes.[17] But the grandparents argue that the law-of-the-case doctrine prevented a determination that a change had occurred in the circumstances of B.J. We agree.

{¶25} The law-of-the-case doctrine provides that the decision of an appellate court on a legal issue remains the law of that case for proceedings both before the trial court and during subsequent review.[18] In this case, the Ohio Supreme Court held that the facts presented in the prior record failed to demonstrate a change in the circumstances of B.J. Based upon this **same record**, the juvenile court found that a change had occurred in B.J.'s circumstances. This finding was contrary to the law-of-the-case doctrine and was, therefore, legally erroneous.

{¶26} We conclude that the juvenile court erred by modifying the prior custody order because the record in this case does not evidence that a change in circumstances had occurred as required by statute. Accordingly, we reverse the juvenile court's judgment and remand the cause for the juvenile court's consideration of the parents' supplemental motion to modify.

Judgment reversed and cause remanded.

HILDEBRANDT, P.J., SUNDERMANN and **CUNNINGHAM, JJ**.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

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[17] See R.C. 3109.04(E)(1)(a); R.C. 2151.42(B).
[18] *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410.